IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Laddu Gopal Vs. State of Rajasthan
(S.B. CRIMINAL APPEAL NO.341/2002)

S. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 26-2-2002 in Sessions Case No.82/2001 passed by Sh. Giriraj Prasad Gupta, RHJS, Additional Sessions Judge No.1 (Fast Track) Jaipur City Jaipur.

Date of Judgment: January 03, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA

Mr. Praveen Balwada, for the appellant.

Mr. M.L.Goyal, Public Prosecutor for the State.

BY THE COURT:

Jai Laxmi @ Suraiya, a retarded woman, was admitted to Retarded & Child Rehabilitation Home Sethi Colony Jaipur. On a letter bearing No.861 dated August 5, 1994 (Ex.P-15) forwarded by Superintendent & Principal, of the said Rehabilitation Home in regard to rape committed with Jai Laxmi, FIR No.223/1994 was registered at Police Station Jawahar Nagar Jaipur under section 376 IPC and investigation commenced. Jai Laxmi was medically examined and her statement under section 164 CrPC was recorded by the Magistrate, other necessary memos were drawn and on completion of investigation charge sheet was filed. Laddu Gopal, the appellant herein, along with Asha Devi and Poonam Chauhan were placed on trial before Learned Additional Sessions Judge No.1 (Fast Track) Jaipur City, who vide judgment dated February 26, 2002 convicted the appellant under section 376(2)(c) IPC and sentenced him to

suffer rigorous imprisonment for ten years and fine Rs.1000/- in default to further suffer one month simple imprisonment. Co-accused Asha Devi and Poonam Chauhan were however acquitted. Against this judgment of the learned trial Judge that this appeal has been filed by the appellant.

2. It is contended by Mr. Praveen Balwada, learned counsel for the appellant that although Jai Laxmi was competent to depose at the trial but she was not examined by the learned trial Judge. In absence of the statement of prosecutrix the prosecution thus failed to establish the charge under section 376 IPC against the appellant beyond reasonable doubt. Per contra, Mr. M.L.Goyal, learned Public Prosecutor supported the impugned judgment and urged that on the basis of the evidence adduced at the trial the appellant was rightly convicted and sentenced.

3. Having scanned the material on record I find that the learned trial Judge did not make proper attempt to examine Jai Laxmi @ Suraiya, although it was incumbent upon learned trial Judge to play an active role in the evidence collecting process i.e. to arrive at just decision. Since Jai Laxmi was examined by the Magistrate under section 164 CrPC during investigation, she could have testified even at the trial. The learned trial Judge did not make sincere efforts to ensure fair trial. In Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004)4 SCC 158 (known as `Best Bakery case') the Apex Court indicated that Section 311 of the Code of Criminal Procedure and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. The efforts should be made to ensure fair trial where the accused and the prosecution both acted in an unfair deal.

4. In K. Chinnaswamy Reddy Vs. State of Andhra Pradesh, 1963

(3) SCR 412, the Apex Court observed as under:-

> "... When Section 439(4) of the Code forbids the High Court from converting a finding of acquittal into one of conviction, it is not proper that the High Court should do the same indirectly by ordering a retrial. It was not possible to lay down the criteria for by which to judge such exceptional cases. It was, however, clear that the High Court would be justified in interfering in cases such as (1) where the trial court had wrongly shut out evidence sought to be adduced by the prosecution (2) where the appeal court had wrongly held evidence admitted by the trial court to be inadmissible (3) where material evidence has been overlooked either by the trial court or the court of appeal or, (4) where the acquittal was based on compounding of the offence not permitted by law and cases similar to the above.
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> (Emphasis supplied)

5. In the instant case as already noticed, I am of the opinion that retrial of the case is necessary. So far as the position of law is concerned, in the retrial the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. Learned trial Judge therefore has to decide the case on the basis of evidence already on record and the additional evidence of Jai Laxmi @ Suraiya, whose statement shall now be recorded under section 311 CrPC. The learned trial court however shall be at liberty to recall the witnesses already examined as well as other witnesses whose evidence is essential to arrive at the truth and just decision of the case.

6. In the ultimate analysis I am of the opinion that in the absence of statement of prosecutrix Jai Laxmi @ Suraiya, the conviction and sentence of the appellant is unmerited.

7. For these reasons, I dispose of instant appeal in the following terms:-

(i) The judgment of learned trial court as well as conviction and sentence of appellant under section 376(2)(c) IPC shall stand set aside.

(ii) The case is remitted to learned Additional Sessions Judge No.1 (Fast Track) Jaipur City for retrial. Record of the case be sent back to learned Additional Sessions Judge No.1 (Fast Track) Jaipur City.

(iii) As a consequence of setting aside the impugned judgment of conviction and sentence of appellant it is not required to keep the appellant behind the bars. Learned Additional Sessions Judge (Fast Track) No.1 Jaipur City therefore is directed to release the appellant Laddu Gopal on bail provided he furnishes personal bond in the sum of Rs.50,000/- with one surety of the like amount to ensure his presence on each day of the trial. Ten days time is granted to furnish bail bonds.

(iv) The Deputy Registrar (Judicial) is directed to immediately remit the case file to learned Additional Sessions Judge (Fast Track) No.1 Jaipur City, Jaipur with a copy of this judgment.

(Shiv Kumar Sharma)J.

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